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No. 91-1607

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KAISER STEEL RESOURCES, INC.,
Formerly Known as KAISER STEEL CORPORATION,
Petitioner,

—*v.*—

PEARL BREWING COMPANY, *et al.*, and
SECURITIES AND EXCHANGE COMMISSION,
Respondents.

KAISER STEEL RESOURCES, INC.
Formerly Known as KAISER STEEL CORPORATION,
Petitioner,

—*v.*—

ACTION TRADERS, INC., *et al.*, and
SECURITIES AND EXCHANGE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 546(e) of the Bankruptcy Code provides that a trustee or debtor in possession may not exercise certain of its avoidance powers to recover a "settlement payment" made "by or to" a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency. Section 741(8) defines "settlement payment" to mean a preliminary, partial, interim or final settlement payment, a settlement payment on account, or "any other similar payment commonly used in the securities trade." The only question presented by the petition is whether, on the specific facts of this case, the payments made by Kaiser Steel Corporation in return for its outstanding common shares in 1984 constituted "settlement payments." The Court of Appeals, in the first appellate decision ever to address the application of section 546(e) to a transaction in which a public corporation purchased its stock from its shareholders, accepted the position asserted by defendants and the Securities and Exchange Commission and answered the question "yes."

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Daily Stock Price Record-New York Stock Exchange, October 1983-March 1984, ed. Standard & Poor's Corp. 10

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BRIEF IN OPPOSITION

Petitioner asks this Court to review the first appellate decision ever to apply section 546(e) of the Bankruptcy Code to a corporation's purchase of its shares. A similar issue has only been addressed in one reported opinion outside these proceedings, a District Court decision that is consistent in result with the decision of the Tenth Circuit. The Court of Appeals' application of section 546(e) was compelled by the plain language of the statute,

advanced the policies underlying its enactment, and was supported by the federal agency with primary responsibility and expertise with respect to those policies. Nothing about the Court of Appeals' decision merits this Court's review and the petition should be denied.

STATEMENT OF THE CASE

These consolidated appeals arise out of a leveraged buyout in 1984 (the "LBO") pursuant to which petitioner Kaiser Steel Resources, Inc. (formerly known as Kaiser Steel Corporation) ("Kaiser") made payments to the beneficial owners of its outstanding common shares in exchange for such shares. The Tenth Circuit's opinion presents the central facts pertinent to the transaction and the procedural history of the litigation (*see* Petition App. A). Accordingly, respondents here provide only a summary discussion of the nature of Kaiser's claims and the prior proceedings.

1. Kaiser's Claims

Kaiser commenced the first of these actions in 1987, shortly after filing a voluntary reorganization petition under chapter 11 of the Bankruptcy Code (the "Code"). Pursuant to section 550 of the Code, which authorizes a trustee or debtor in possession to recover voidable transfers of property from certain "transferees," Kaiser seeks to recover the payments that it made in exchange for its outstanding common stock on the ground that those payments are allegedly voidable under section 544(b) of the Code. Section 544(b) authorizes a trustee or debtor in possession to avoid transfers that could be avoided by a creditor under state law. In particular, Kaiser asserts that the payments it made are voidable under the provisions of the Uniform Fraudulent Conveyance Act ("UFCA") as adopted in California, where Kaiser was headquartered at the time of the LBO.[1]

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[1] The Bankruptcy Code includes its own fraudulent conveyance provision, section 548. This section is inapplicable to Kaiser's claims because it only authorizes the avoidance of transfers made within one year prior to the filing

(continued...)

The avoidance powers conferred by section 544 are not absolute. Section 546(e) prohibits a trustee or debtor in possession from invoking section 544 and most of the Code's other avoidance provisions to avoid a "settlement payment . . . made by or to . . . a stockbroker, financial institution, or securities clearing agency." "Settlement payment" is defined as, *inter alia*, a preliminary, partial, interim or final settlement payment "or any similar payment used in the securities trade." 11 U.S.C. § 741(8).

2. Procedural Background

The assertion that section 546(e) bars Kaiser from recovering the payments it made pursuant to the LBO was first raised in connection with a "test motion" for summary judgment by Charles Schwab & Co. ("Schwab"). Schwab received payments pursuant to the LBO solely as a financial intermediary, on behalf of its customers who owned Kaiser stock, and credited those payments to the customers' accounts.[2] The United States District Court for the

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1(...continued)

of the petition. Since Kaiser filed its petition nearly three years after the 1984 LBO, it was forced to resort to section 544 of the Code and the California UFCA.

2 In connection with Schwab's motion, Kaiser filed a Statement of Facts which described the procedure by which Kaiser's shares were exchanged for cash pursuant to the LBO as follows:

"13. In connection with exchange offers, [the Depository Trust Company] surrenders securities on behalf of, and at the instructions of, its participants and disburses payments in return for the surrendered securities, whether in cash and/or DTC-eligible securities, to its participants. . . .

"14. National Securities Clearing Corporation ("NSCC") is a participant in DTC. NSCC is also a clearing agency registered under the Securities Exchange Act of 1934. NSCC has a number of members, who may be NSCC-sponsored participants in DTC. When the Kaiser leveraged buyout took place and when dividends were thereafter paid on Kaiser preferred stock, Schwab was a member of NSCC and NSCC-sponsored participant number 0164 in DTC. DTC

(continued...)

District of Colorado, in reversing the decision of the Bankruptcy Court (Petition App. B), dismissed Kaiser's claims against Schwab on the alternate grounds that (i) Schwab was not a "transferee" from which the payments could be recovered under section 550 of the Code and (ii) the payments were exempt from avoidance under section 546(e) (Petition App. F).

Kaiser appealed that decision to the Tenth Circuit. After considering a number of briefs and oral argument, including the brief and argument submitted by the Securities and Exchange Commission in support of Schwab's position,[3] a unanimous panel of the Court of Appeals affirmed the District Court's decision solely on the grounds that the payments pursuant to the LBO were "settlement payments" and the payments received by Schwab (a stockbroker) were thus exempt from avoidance under section 546(e). *See Kaiser Steel Corp.* v. *Charles Schwab & Co.*, 913 F.2d 846, 850 (10th Cir. 1990) (Petition App. J at 10J). Kaiser did not seek certiorari to review the *Schwab* decision.

2(...continued)

credited all Kaiser funds payable to Schwab to NSCC-sponsored account 0164, and gave NSCC *a daily cash settlement statement* identifying that account and others entitled to Kaiser funds, and the amount due to each. NSCC added the credit of Kaiser funds to credits for all its other Schwab transactions on each payment date, and offset the credits against debits for all its other Schwab transactions on each date. If a net balance was due to Schwab, NSCC paid Schwab that day. If a net balance was due from Schwab to NSCC, Schwab was obligated to pay NSCC that day." Kaiser's Statement of Facts re: Schwab's Motion for Summary Judgment 5 (November 29, 1988) (emphasis added).

3 As a statutory party in corporate reorganization proceedings, the Securities and Exchange Commission acts as a special advisor to the courts in order to protect the interests of public investors. The Commission initially submitted a brief in this capacity to the District Court in support of Schwab's position. Although precluded from initiating an appeal when appearing in this capacity, the Commission may participate in an appeal taken by others. *Sheftelman* v. *Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir. 1987); *see* 11 U.S.C. § 1109(a).

During the pendency of Kaiser's appeal in *Schwab*, summary judgment motions were filed in the District Court by 88 other defendants that, like Schwab, received LBO payments as financial intermediaries. During oral argument on those motions, Kaiser's attorney explicitly conceded that if section 546(e) exempts the payments received by financial intermediaries from avoidance, it also exempts the payments received by the beneficial owners of the shares.[4]

The District Court granted the financial intermediaries' motions solely on the basis of section 546(e) (Petition App. G), declining to hear oral argument concerning the defendants' "transferee" status in light of alleged disputed issues of fact. In view of Kaiser's concession that this decision would require dismissal of its claims

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4 The concession (which Kaiser chose not to include in appendix G to the petition with another excerpt from the same hearing transcript) follows:

"MR. HARPER: The critical language in Section 546(e) is 'a payment by or to,' in this case, 'a stockbroker.'

". . . .

"If by chance this court rules today that these payments were payments to a stockbroker, therefore barring a suit by Kaiser against the stockbrokers, those very same payments are payments by a stockbroker to the beneficial interest—or holders; and in fact, your Honor, you are deciding that question today. That question is being presented by you, and in essence it was presented to the Tenth Circuit yesterday.

". . . .

". . . [W]e have thought long and hard about how you could differentiate or how a court could differentiate between the payment to the stockbroker and the payment by a stockbroker.

"Mr. Blejwas, has, in fact, correctly articulated and explained the distribution system; and if these are settlement payments, we submit that they would, in fact, preclude us from going against the shareholders." July 24, 1990 Tr. (R. 109) 34-35.

Kaiser made substantially similar statements in its argument before the Tenth Circuit on the *Schwab* appeal.

against the former stockholders, the District Court also stated that it was inclined to dismiss those claims *sua sponte*. The court afforded the parties an opportunity to submit briefs in support of and in opposition to its proposed decision and, after the briefs were submitted, entered an order dismissing Kaiser's claims against all its former stockholders other than the "Jacobs Group," a group that attempted to gain control of Kaiser prior to the LBO and allegedly received "greenmail" payments (Petition Apps. H, I).

Kaiser again appealed to the Tenth Circuit. After the Tenth Circuit issued its decision in *Schwab*, Kaiser stipulated to affirmance of the dismissal of all claims to recover payments that it acknowledged to have been received by the appellees as financial intermediaries.[5] The only issue before the Tenth Circuit was the application of section 546(e) to the payments received by the former beneficial owners of Kaiser stock (the respondents here).[6] The Securities and Exchange Commission again submitted a brief as a statutory party in support of the District Court's decision.

On December 30, 1991, the Tenth Circuit unanimously affirmed the dismissal of Kaiser's claims against its former stockholders (Petition App. A). Citing the Code's expansive definition of "settlement payment," the meaning of "settlement" in the securities industry and its own prior holding in *Schwab*, the Tenth Circuit again held that the LBO payments were "settlement payments." The court went on to hold that the settlement payments were exempt from avoidance in accordance with the plain language of section 546(e), noting that Kaiser did not dispute that all of the

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5 Kaiser continues to pursue its claims against certain respondents that received payments as financial intermediaries on the ground that they have not proved that they acted as financial intermediaries to Kaiser's satisfaction. As a result, Kaiser's statement that "the remaining defendants/appellees are all beneficial shareholders, in whole or in part" (Petition 8) is not entirely correct.

6 The respondents are not a homogeneous group, but rather include a wide assortment of banking institutions, stockbrokers trading for their own accounts, pension plan trustees and individual investors (including retirees).

payments to the stockholders were made *by* either a stockbroker, financial institution or securities clearing agency.

SUMMARY OF ARGUMENT

Petitioner fails even to acknowledge that certiorari is appropriate only upon a showing of "special and important reasons" for review by this Court. *See* Sup. Ct. R. 10.1. No issue presented here could justify review of the Tenth Circuit's decision.

First, the decision below does not conflict with the decision of any United States Court of Appeals. Indeed, the Tenth Circuit is the first and only Court of Appeals to have addressed the application of section 546(e) to a transaction in which a public corporation purchases its stock from its shareholders. Moreover, the Tenth Circuit's interpretation of "settlement payment" is entirely consistent with the broad construction of the term espoused by the only other Court of Appeals that has addressed it.

Second, the question decided by the Tenth Circuit is not one of such grave national importance as to require this Court's immediate attention. The decision below, applying a technical provision of the Bankruptcy Code, will not shape behavior or have any practical consequences beyond the outcome of this litigation. Nor will the decision, if left undisturbed, foreclose future litigation of the same issue in other courts. Any assertion that the application of section 546(e) to leveraged buyouts is the subject of significant public concern is belied by the fact that, outside these actions, only one other court (a District Court) has addressed the issue in a reported decision.

Simply put, Kaiser's petition for review is not supported by any compelling reasons of the character enumerated in Rule 10. Instead, the petition is devoted primarily to "deep pocket jurisprudence" and arguments that the decision below was erroneous. A party's disagreement with the outcome of litigation is not a sufficiently "special and important" reason for this Court to grant certiorari.

ARGUMENT

I.

THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY UNITED STATES COURT OF APPEALS.

Petitioner acknowledges that the Tenth Circuit is the only United States Court of Appeals that has addressed the application of section 546(e) to payments made to stockholders in a leveraged buyout in exchange for their shares, and accordingly concedes that the decision below does not conflict with the decision of any Court of Appeals (Petition 11).

The Tenth Circuit's conclusion that the LBO payments were "settlement payments" is also entirely consistent with the broad application of the term espoused by the only other Court of Appeals that has construed that term. In *Bevill, Bresler & Schulman Asset Management Corp.* v. *Spencer Savings & Loan Ass'n (In re Bevill, Bresler & Schulman Asset Management Corp.)*, 878 F.2d 742, 751 (3d Cir. 1989), the Third Circuit considered the expansive list of possible types of settlement payments included in section 741(8) and concluded that the term should be construed liberally in order to effectuate Congress's intention to "'ensure that the avoiding powers of a trustee are not construed to permit . . . settlement payments to be set aside except in cases of fraud [by the purchaser.]' 1982 House Report."[7]

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7 Petitioner suggests that the Tenth Circuit "erroneously considered the repurchase agreements at issue in *Bevill, Bresler* not to be trades," and therefore erroneously relied on the case for the proposition that settlement payments could occur in transactions not involving the trading of securities (Petition 18). In fact, the Tenth Circuit cited *Bevill, Bresler* as holding that the definition of settlement payment "applies to payments made in connection with a repurchase agreement, which is not a 'trade' entered into *on an exchange*" (Petition App. A at 22A-23A) (emphasis added). This was undoubtedly in response to Kaiser's argument that the (continued...)

Unable to identify a circuit split, petitioner cites a purported "direct conflict" between the decision below and the District Court's decision in *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 Bankr. 655 (N.D. Ill. 1991) (Petition 11). As an initial matter, even an irreconcilable conflict with a District Court decision is rarely serious enough to justify review by this Court. Indeed, Rule 10 does not identify this type of conflict as a basis for review.

In any event, petitioner has ignored the procedural history of *Wieboldt*. The debtor in *Wieboldt* originally sought to recover funds paid to both insider and non-insider public shareholders in connection with a leveraged buyout. In a 1988 decision, the District Court dismissed the claims against the non-insider shareholders pursuant to the section 550(b) "good faith exception," finding them "innocent pawns" in the transaction. *Wieboldt Stores, Inc.* v. *Schottenstein*, 94 Bankr. 488, 503 (N.D. Ill. 1988). While there is no indication in the decision that the court considered the application of section 546(e), dismissal of the claims against the non-insider shareholders would have been entirely consistent with section 546(e). The defendants that unsuccessfully sought dismissal pursuant to section 546(e) in the 1991 *Wieboldt* decision cited by petitioner were all insider shareholders that played some role in engineering the transaction, and were all facing allegations of actual fraud in connection with transfers that occurred within one year prior to the filing of the petition. *See* 131 Bankr. at 663; 94 Bankr. at 493-96. Since section 546(e) does not bar a claim pursuant to section 548(a)(1) of the Code, relating to transfers made within one year before the petition with actual intent to defraud, these are precisely the types of defendants whose liability is largely unaffected by section 546(e). Any perceived conflict with *Wieboldt* is substantially diminished in light of these facts.

The fact that the Tenth Circuit is the only court other than the District Court in *Wieboldt* to consider the issue presented by the

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7(...continued)

term "settlement payment" only applies to the completion of routine securities transactions on an organized exchange.

petition militates strongly against immediate review by this Court, and in favor of allowing further consideration of the issue in the lower courts.

II.

THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW.

The question of whether a provision of the Bankruptcy Code should be applied in accordance with its terms to a leveraged buyout is not of such public importance that this Court should review the decision below in the absence of a circuit conflict. Contrary to petitioner's assertions, neither the decision's impact on Kaiser's retirees nor its possible effect on future LBO-related fraudulent conveyance actions is a "special and important reason" for certiorari.

The possible effect of the Tenth Circuit's decision on the continued availability of pension and medical benefits to Kaiser's retirees may arouse some sympathy, but it is not a matter of significant national importance. It is well-established that an issue only warrants this Court's review on the basis of importance if it is important to the public, as opposed to particular parties. *See Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioner's attempt to appeal to emotion, therefore, is wholly inappropriate and should be disregarded.[8]

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[8] Petitioner suggests that many of Kaiser's stockholders were paid handsome premiums when they tendered their shares in the LBO (Petition 3, 27). In fact, in the weeks before the LBO, investors were purchasing and selling Kaiser common stock in the open market for prices in excess of $41.00 per share. *See Daily Stock Price Record-New York Stock Exchange*, October 1983-March 1984, ed. Standard & Poor's Corp. The consideration paid for each share pursuant to the LBO comprised the $22.00 in cash Kaiser now seeks to recover plus two shares of preferred stock with a combined market value of approximately $20.00. Kaiser

(continued...)

The Court of Appeals' interpretation of section 546(e) is of no importance to the planning of any future transactions. No board of directors would ever rationally engage in a leveraged buyout that might involve a fraudulent conveyance in reliance on the protection afforded to stockholders by section 546(e). The laws of Delaware and many other jurisdictions provide that directors are personally liable if they cause their corporation to make payments to stockholders that render the corporation insolvent. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 160(a)(1), 174(a) (1991); CAL. CORP. CODE §§ 316(a)(1), 501 (West 1990); N.Y. BUS. CORP. LAW §§ 510(a), 513, 719(a) (McKinney 1986). Section 546(e) is of importance solely in resolving post-transaction litigation, not in the conduct of business.

Finally, any assertion that the question presented assumes national importance is belied by the fact that, since section 546(e)'s enactment in 1982, litigation outside these actions over the application of section 546(e) to leveraged buyouts has resulted in only one reported decision. It cannot be seriously contended that an issue arising so infrequently is particularly important or significant.

III.

THE TENTH CIRCUIT'S DECISION WAS CORRECT.

Rather than identifying "special and important reasons" for review by this Court as directed by Rule 10, Kaiser devotes most of its petition to arguments that the Tenth Circuit's decision was erroneous. Kaiser urges that two unanimous panels of the Tenth

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8(...continued)

> does not pretend that it can assert claims against persons that sold their shares in the public market prior to the LBO for $41.00 in cash. It would be highly inequitable to permit a recovery of $22.00 per share against arbitrageurs or other investors that at most reaped a modest one dollar per share profit by buying shares from the public and reselling them to Kaiser, and that may actually have incurred losses if the preferred shares were not sold prior to Kaiser's bankruptcy for their original market value.

Circuit and the Securities and Exchange Commission were incorrect in characterizing the LBO payments as "settlement payments."[9]

A. The Tenth Circuit Correctly Held that the LBO Payments Were "Settlement Payments."

The Tenth Circuit, both in *Schwab* and the instant actions, held that the LBO payments were "settlement payments" as defined by section 741(8) of the Code.[10] That holding is supported by the expansive language of section 741(8) and by the holdings of the only other courts that have addressed the definition of "settlement payment." *See Bevill, Bresler & Schulman Asset Management Corp.* v. *Spencer Savings & Loan Ass'n (In re Bevill, Bresler & Schulman Asset Management Corp.)*, 878 F.2d 742, 751 (3d Cir. 1989); *Jonas* v. *Farmer Bros. Co. (In re Comark)*, 124 Bankr. 806, 816-17 (Bankr. C.D. Cal. 1991); *Blanton* v. *Prudential-Bache Securities, Inc. (In re Blanton)*, 105 Bankr. 321, 347-48 (Bankr. E.D. Va. 1989). Those courts recognized that the term must be

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9 Kaiser also argued in the Court of Appeals that section 546(e) should be read only to exempt payments made "to" the entities enumerated in the statute, and not payments made "by" those entities to stockholders. This argument, which Kaiser is apparently no longer pursuing, is flatly contradicted by the plain language of section 546(e) which clearly exempts from avoidance any settlement payments made "by *or* to" the enumerated entities.

10 In *Schwab*, the Tenth Circuit held that all of the LBO payments were "settlement payments" (Petition App. J at 10J). Curiously, Kaiser did not seek this Court's review of that decision. Equally curious is Kaiser's decision to abandon its claims against the other financial intermediaries after the District Court dismissed the claims against them, holding that the LBO payments were "settlement payments" as a matter of law (Petition App. G at 7G). Whatever strategy governed these tactics, it certainly appears inconsistent for Kaiser now to challenge the Tenth Circuit's "settlement payment" holding only with respect to the former stockholders. While a determination that the LBO payments were not "settlement payments" would not affect the liability of the financial intermediaries that have been dismissed from this litigation, it would eliminate section 546(e)'s protections for financial intermediaries in future cases.

interpreted broadly to effectuate Congressional intent, which was "to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." H.R. Rep. No. 420, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583.

Section 741(8) defines "settlement payment" as, *inter alia*, a preliminary, partial, interim or final settlement payment "or any similar payment used in the securities trade." The Tenth Circuit recognized that this definition must be applied in accordance with the industry meaning of "settlement payment" (Petition App. A at 17A-18A). Petitioner now maintains that the Tenth Circuit misapplied the securities industry's definition of the term, notwithstanding the fact that the Securities and Exchange Commission — the federal agency that regulates the securities industry — submitted briefs throughout these proceedings stating that the LBO payments fit within the industry definition of "settlement payments."

Petitioner's arguments (most of which were presented to the Tenth Circuit and rejected as indicated in the decision below) lack any support as authoritative on the issue as the views of the Securities and Exchange Commission, and contradict the sweeping statutory definition of "settlement payment."

B. The Tenth Circuit Correctly Held that Section 546(e) Exempts from Avoidance the Settlement Payments to the Stockholders.

Despite the clear application of section 546(e) to the payments to Kaiser's stockholders, and in blatant disregard of its concession to the District Court that section 546(e) would apply equally to the financial intermediaries and the stockholders, petitioner now contends that the Tenth Circuit erroneously applied section 546(e) to the LBO payments received by the stockholders. Petitioner's position is entirely inconsistent with firmly established rules of statutory construction and with the relevant public policies, both of which confirm that the Tenth Circuit's decision was correct.

1. The Plain Language of Section 546(e) Is Controlling.

Section 546(e) is cast in unequivocal terms: it clearly exempts from avoidance any settlement payment made "by *or* to" a stockbroker, financial institution or securities clearing agency. Thus, a trustee is precluded from recovering any settlement payment made *by* an enumerated entity, without regard to the recipient of the payment. Nothing in section 546(e) or any other provision of the Bankruptcy Code even remotely suggests that Congress intended otherwise.[11] In these circumstances, a court must apply the plain language of section 546(e). *See Union Bank* v. *Wolas*, 112 S. Ct. 527 (1991).

Since Kaiser does not dispute that all of the LBO payments to the stockholders were made *by* one of the entities enumerated in Section 546(e), it has no tenable basis for challenging the Tenth Circuit's decision. Petitioner's assertion that settlement payments received by beneficial shareholders are not exempt from recovery because Congress did not include "equity security holders" within the scope of section 546(e) (Petition 14) is spurious. By exempting payments made "by" an enumerated entity without regard to the recipient of the payments, Congress avoided the necessity of

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11 Comparison with sections 362(b)(6) and 548(d)(2) of the Bankruptcy Code confirms that section 546(e) exempts settlement payments made by the enumerated entities without regard to the identity of the recipient. Section 362(b)(6) creates an exemption to the automatic stay to permit setoffs of certain margin payments or settlement payments, and section 548(d)(2)(B) provides that certain margin and settlement payments shall be deemed to be taken for value for purposes of the Code's fraudulent conveyance provisions. In both sections 362(b)(6) and 548(d)(2), the preferential treatment is explicitly limited to payments owed to or received by one of the enumerated entities that are also referred to in section 546(e). In contrast, section 546(e) explicitly exempts such payments when made "by" as well as "to" one of the enumerated entities. The choice of starkly different language for section 546(e) reflects a deliberate choice to exempt exactly the payments that Kaiser asserts were not within Congress's intent.

including "equity security holders" and all other possible recipients in the language of section 546(e).

2. Applying Section 546(e) in Accordance With Its Plain Language Is Consistent With Compelling Federal Policies.

As the Tenth Circuit recognized in its *Schwab* decision, applying the plain language of section 546(e) to the payments received by respondents is consistent with sound public policy considerations, such as "protect[ing] the nation's financial markets from the instability caused by the reversal of settled securities transactions" (Petition App. J at 6J). Congress has always been vitally concerned with protecting investors in the securities markets, and has repeatedly enacted legislation designed to establish such protections.

For example, in 1975 Congress adopted legislation, codified as section 17A of the Securities Exchange Act of 1934, in which it called for the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions. In so doing, Congress recognized that "the securities markets of the United States are indispensable to the growth and health of this country's and the world's economy," H.R. Conf. Rep. No. 229, 94th Cong., 1st Sess. 91 (1975). Congress also found that the prompt and efficient settlement of securities transactions is of vital importance to the integrity of those securities markets. *Id.*; Securities Exchange Act § 17A, 15 U.S.C. § 78q-1.

Congress thus endeavored to promote the development and use of efficient securities markets and to protect the participants in those markets. Like the promotion of efficient securities clearance and settlement systems, the enactment of section 546(e) to protect payments made through those systems implements the policies of safeguarding public confidence in the securities markets and encouraging active participation in those markets. Indeed, the Securities and Exchange Commission urged Congress to adopt section 546(e) and related amendments to the Bankruptcy Code in order to eliminate uncertainties that are inimical to the efficient

working of the national securities clearance and settlement system, "uncertainties which could jeopardize the protection of investors which Congress endorsed so strongly in the 1975 amendments to the Exchange Act," *Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 238 (1981) (Testimony of SEC Commissioner Bevis Longstreth).

In enacting section 546(e)'s restrictions on the avoidance of settlement payments, Congress weighed the policy of ensuring stability and certainty in securities transactions against the policy of allowing bankruptcy trustees and debtors in possession to undo transactions with the aid of the fraudulent conveyance laws. Congress struck a balance between these competing policies by insulating securities transactions from avoidance unless (i) the bankruptcy trustee is able to demonstrate fraudulent intent and (ii) the bankruptcy petition is filed within one year after the transaction, as required by section 548(a)(1). Thus, with the exception of transfers subject to section 548(a)(1), Congress made a conscious decision that market participants should not be held accountable for transfers made by or to them in settlement of securities transactions.

The limitations of section 546(e) ensure the finality of settled securities transactions. Unless these limitations are strictly enforced to preclude the reversal of settled securities transactions, investor confidence and the attendant stability of the securities markets will be seriously undermined. Sound considerations of public policy such as these confirm that the Tenth Circuit was correct in precluding Kaiser from recovering the LBO payments from its former stockholders.

CONCLUSION

The petition does not identify any sufficiently "special and important reasons" for this Court to issue a writ of certiorari to review the decision below. Accordingly, the petition should be denied.

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APPENDIX

Rule 29.1 Statement

Pursuant to Rule 29.1 of this Court, respondents joining in this Brief in Opposition that are corporations submit this designation of corporate relationships.

1. Respondent A.G. Edwards & Sons, Inc. is wholly owned by A.G. Edwards, Inc.

2. Respondent Bankers Trust Company is wholly owned by Bankers Trust New York Corporation. The following entities are publicly-held subsidiaries of Bankers Trust Company: Bankers Trust International PLC, Mortgage Asset Residential SEC No. 1 PLC, Mortgage Asset Residential SEC No. 2 PLC, Pyramid Holdings PLC and World Markets Company PLC, which are all part of Bankers Trust Company's European holdings.

3. Respondent Dillon, Read & Co. Inc. is wholly owned by Dillon, Read Inc., which is wholly owned by Dillon, Read Holding Inc. Dillon, Read Holding Inc. is 60% owned by Dillon, Read & Co. Inc.'s senior management and 40% owned by Baring (U.S.) Holdings Limited, an indirect wholly owned subsidiary of Barings plc. The following entities are subsidiaries of Dillon, Read & Co. Inc.: Again Limited (Channel Islands), Dillon, Read Capital Inc., Dillon, Read Limited, Dillon, Read Real Estate Inc., Dillon, Read Services Inc. and Selinus Corporation N.V.

4. Respondent Eppler, Guerin & Turner is wholly owned by Principal Mutual Life Insurance Company.

5. Respondent Falstaff Brewing Corp. is wholly owned by S&P Company.

6. Respondent Flemings North America Inc. has been merged into Robert Fleming Inc., which is wholly owned by Robert Fleming Holdings, Inc.

7. Respondent Marcus Schloss & Co., Inc. has no corporate parent. Marsch & Co. is a subsidiary of Marcus Schloss & Co., Inc.

8. Respondent Marine Midland Bank, N.A. is wholly owned by Hong Kong and Shanghai Banking Corporation, Limited.

9. Respondent Pearl Brewing Company is wholly owned by S&P Company.

10. Respondent Securities Settlement Corporation is wholly owned by Securities Settlement Holding Co., Inc., which is wholly owned by Jesup Josephthal Securities Group, Inc.

11. Respondent Smith Barney, Harris Upham & Co. is wholly owned by Primerica Corporation, which is wholly owned by Primerica Holdings, Inc., which is wholly owned by Smith Barney Holdings, Inc., which is wholly owned by Smith Barney Inc.

12. Respondent Sutro & Co., Inc. is wholly owned by John Hancock Mutual Life Insurance Company.

13. Respondent U.S. Clearing Corp. is wholly owned by Quick & Reilly Group, Inc.